STATE OF MICHIGAN

COURT OF APPEALS

XAVIER MALLORY,

Plaintiff-Appellant,

v

PLATINUM SPORTS, LTD., d/b/a THE ALL-STAR SPORTS BAR,

Defendant-Appellee.

UNPUBLISHED
March 16, 2006

No. 257671
Wayne Circuit Court
LC No. 03-328118-NO

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). This case arose out of plaintiff's presence at defendant's place of business for the purpose of picking up his fiancée, Shelia Morris (Morris), who worked there as a topless dancer. Plaintiff had an agreement with Morris not to patronize defendant's business because Morris was employed there. On this occasion, he spent no money there, did not pay for parking, and was only inside defendant's place of business for less than five minutes, just long enough to make eye contact with Morris so she knew that plaintiff was ready to take her home. On their way back to plaintiff's car, plaintiff slipped and fell on a patch of ice. The trial court granted summary disposition because plaintiff was a licensee and the ice was open and obvious. We affirm.

Our review of a motion for summary disposition is de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the evidence shows no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washentaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). Whether a plaintiff was a licensee or an invitee is a question of law that we also review de novo. *Stitt v Holland Abundant Life*, 462 Mich 591, 595; 614 NW2d 88 (2000).

Plaintiff first argues that there was a genuine issue of material fact whether he was a licensee or an invitee. We disagree.

A landowner generally must exercise reasonable care to warn and protect business invitees from an unreasonable risk of harm caused by a dangerous condition of the land that the landowner knows or should know the invitees will not discover, realize, or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). A landowner generally only has a duty to warn licensees of hidden dangers the landowner knows or has reason to know of, but only if the licensee does not know or have reason to know of the dangers involved. *Burnett v Bruner*, 247 Mich App 365, 378; 636 NW2d 773 (2001). A licensee is one who is on the premises of another because of some personal, unshared benefit, and is merely tolerated by the owner. *Taylor v Laban*, 241 Mich App 449, 454; 616 NW2d 229 (2000). In contrast, an invitee is a person who is on the landowner's premises for a reason directly connected to the landowner's commercial business interest. *Stitt, supra* at 597-599. Invitee status carries an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises and make it safe for the invitee. *Id*., 596-597. As a general rule, if there is evidence from which invitee status might be inferred, it is a question for the jury. *Id*., 595.

Here, plaintiff's presence at defendant's place of business provided no economic benefit whatsoever for defendant. Rather, plaintiff was there solely as transportation for Morris. Plaintiff's act of picking up Morris did not provide an economic benefit to defendant. Plaintiff was not saving defendant from having to drive Morris home. Defendant did not have an agreement with plaintiff for plaintiff to provide Morris with rides to and from work. The only agreement that existed was between plaintiff and Morris, solely for the benefit of Morris. Only Morris provided any economic benefit to defendant. We find plaintiff's act merely analogous to that of a taxicab or bus driver. We find no evidence from which to infer that plaintiff was an invitee, so the trial court properly determined as a matter of law that plaintiff was a licensee whose presence was merely tolerated by defendant. *Stitt, supra* at 595, 597-599; *Taylor, supra* at 454.

Plaintiff attempts to analogize his actions to a delivery truck driver. See *Marr v Yousif*, 167 Mich App 358; 422 NW2d 4 (1988), *Mills v AB Dick Company*, 26 Mich App 164; 182 NW2d 79 (1970), and *Fries v Merkley*, 8 Mich App 177; 154 NW2d 50 (1967), for the proposition that delivery truck drivers confer an economic benefit to those they deliver to, and thus, are considered invitees. However, that situation is distinguishable because delivery truck drivers enter onto business owners' properties pursuant to commercial agreements to deliver certain products. No agreement between plaintiff and defendant existed here. Plaintiff's analogy to *White v Badalamenti*, 200 Mich App 434; 505 NW2d 8 (1993), is distinguishable for the same reason. In that case, the plaintiff slipped and fell when she went to the defendant's house to pick up her daughter, whom the defendant was babysitting for free but pursuant to an informally agreed upon exchange of helping each other with babysitting duties, which provided an economic benefit to both parties. *Badalamenti, supra* at 436-437. Again, no agreement existed here.

Plaintiff argues that defendant was obligated to warn him of a known dangerous condition even if plaintiff is a licensee. Under the circumstances of this case, we disagree.

A possessor of land has no obligation toward a licensee regarding an open and obvious danger. *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001). A defect falls under the open and obvious doctrine if it creates a risk of harm only because the invitee did not

discover the condition or realize its danger, and the invitee should have discovered the condition and realized its danger. *Bertrand, supra* at 611. Determination whether a danger is open and obvious depends on whether "an average user with ordinary intelligence [would] have been able to discover" the risk presented upon a casual inspection. *Corey v Davenport College of Business* (*On Remand*), 251 Mich App 1, 5, 8; 649 NW2d 392 (2002). The fact that a party claims that he did not know of the condition is irrelevant. *Novotney v Burger King Corporation* (*On Remand*), 198 Mich App 470, 475; 499 NW2d 379 (1993).

Michigan courts have consistently held that, absent special circumstances, the hazards presented by ice and snow are open and obvious and do not impose a duty on the property owner to warn or remove the hazard. *Corey, supra* at 4-5, 8. Our Supreme Court recently affirmed the assertion that ice and/or black ice is generally an open and obvious condition when it reversed *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 689 NW2d 737 (2004), rev'd 472 Mich 929 (2005). When reversing this Court's decision, our Supreme Court relied on this Court's dissenting opinion in *Kenny, supra*, which stated that, even though the "black ice took on the color of the asphalt pavement beneath it and was not easily visible on casual inspection, the ice was virtually undetectable in the evening darkness, and the ice was hidden and camouflaged by a layer of snow," the "black ice" still should have been discovered by "Kenny" because it was a cold winter day, and an average Michigander with ordinary intelligence would have concluded that the parking lot could be slippery. *Kenny, supra* at 115-122.

Here, plaintiff had been a Michigan resident for some time. The incident took place in the middle of the winter. Plaintiff noted that it was a brisk and chilly day, and even stated that it continued to get colder as the day progressed. Furthermore, plaintiff did not present an argument or any evidence that the condition that caused him to fall contained special aspects.[1] Therefore, we conclude that plaintiff should have discovered the "black ice" that caused him to fall, and thus, defendant did not owe a duty to plaintiff. *Burnett, supra* at 378. Thus, we conclude that the trial court properly granted defendant's motion for summary disposition. *Veenstra, supra* at 164.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

---

[1] Even if a defect is open and obvious, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the plaintiff, then the circumstances may be such that the landowner is required to undertake reasonable precautions. *Bertrand, supra* at 611. "The critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm." *Lugo v Ameritech Corp*, 464 Mich 512; 517; 629 NW2d 384 (2001).